

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF THE SEARCH OF : MAGISTRATE NO.
NATIONAL REFRIGERANTS, INC. : 95-337

MEMORANDUM

GILES, J.

July 31, 2003

National Refrigerants, Inc. ("NRI"), appeals from the Order of a Magistrate Judge wherein that court denied its motion to compel disclosure of the identity of two informants who had provided information incorporated into an Affidavit submitted by the United States Customs Agency in support of an application for a search warrant of NRI's business premises. NRI had also sought to compel production of all related documents. For the reasons which follow, NRI's present motion to compel is denied in all respects.

I. FACTS

On April 11, 1995, the United States Customs Agency presented to a United States Magistrate an Affidavit in Support of an application for a search warrant of the Northeast Philadelphia business premises of NRI. The warrant issued. The search and seizure of NRI property was part of an ongoing investigation into suspected illegal importation of refrigerant materials into the United States. Based upon the averments in the Affidavit the

Magistrate Judge formed probable cause to believe NRI was involved in some way in that alleged illegal importation. At least twenty-six (26) boxes of materials were removed from the NRI premises by the Customs Agents. NRI concedes that the Government conducted the search and seizure in a professional, non-coercive manner.

After review of the evidence seized from NRI and the fruits of its further investigation, the Customs Agency concluded that NRI, itself, was not a target of the criminal investigation.¹

Soon after the search, NRI requested a copy of the probable cause affidavit from the Government. In May of 1995, the Government first released to NRI a redacted version of the affidavit. However, two months later, after some discussions between the parties, the Government gave NRI an unredacted copy.

In October of 1996, NRI filed its motion to compel the Government to reveal the informants' identities. In support, NRI asserted that the informants must have been industry competitors whose purpose was to harm NRI's business for competitive advantage. Therefore, NRI averred that it needed their names in order to bring a civil action for business disparagement. However, before the Magistrate Judge and before this court, NRI could point to no economic harm arising from the execution of the warrant or even any publication of the warrant to the public or to the industry.

By a Memorandum and Order dated December 3, 1996, citing

¹ According to testimony presented at the hearing, there is an ongoing investigation into the activities of at least one former NRI employee who is believed to have illegally imported refrigerant materials without NRI's knowledge and/or consent.

Roviaro v. United States, 353 U.S. 53 (1953), the Magistrate Judge held that "[s]ince the government has asserted the informer's privilege and the movant has failed to show a need for the information that outweighs the government's privilege, the motion of National Refrigerants will be denied." In re The Search of National Refrigerants, Inc., Mag. No. 95-377-M at 4 (E.D. Pa. Dec. 3, 1996). NRI timely appealed by filing objections with this court on December 13, 1996. On March 31, 1997, this court held a hearing and received additional evidence from both sides.

II. STANDARD OF REVIEW

Rule 72 of the Federal Rules of Civil Procedure, adopted pursuant to Section 636(b) of Title 28 of the United States Code, sets forth the standard by which a United States District Court shall review Orders issued by United States Magistrate Judges. Fed. R. Civ. P. 72; See 28 U.S.C. § 636(b). Rule 72(b) states that when a Magistrate Judge decides a dispositive motion the "district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any specific written objection has been made in accordance with this rule." Fed. R. Civ. P. 72(b).

III. ANALYSIS

In its Notice of Objections, NRI claims that the following errors where made by the Magistrate Judge:

A) The Magistrate Judge should have considered, as admissions,

allegations contained in NRI's motion that were inadequately responded to by the Government;

B) The Magistrate Judge erred in not allowing a hearing on the motion;

C) The Magistrate Judge failed to recognize that the Government had not made the required particularized showing that the informer expected confidentiality; and

D) The Magistrate Judge came to the wrong conclusion after applying the Roviaro test.

Each of these contentions will now be addressed.

A. Should the Government's alleged lack of response to NRI's allegations require the court to consider the allegations as admitted?

NRI claims that because the Government responded to many of NRI's allegations by stating "[n]either admitted nor denied" the Government did not comply with Rule 8(b) of the Federal Rules of Civil Procedure, and should therefore suffer the sanction permissible under Rule 8(d) of having the averments deemed admitted. We disagree. The NRI "complaint" was a motion for relief directed to the sound discretion of the court as contrasted to a complaint against the Government to which the Government had an obligation to respond pursuant to Rule 8(b). Consequently, the Magistrate Judge did not err in failing to deem NRI's averments admitted.

B. Did the Magistrate Judge err in not allowing a hearing on the motion?

This objection is moot since this court did hold a de novo hearing, allowing NRI an opportunity to present additional evidence.²

C. Was the Government required to make a particularized showing that the informer expected confidentiality?

In United States v. Landano, 508 U.S. 165, 168 (1993), the Supreme Court held that to justify withholding the identity of an informer, and other information given by that source, the Government would have to make a particularized showing as to the source's belief that his or her identity and/or information would be kept confidential.

This court finds that the Government did provide a showing consistent with Landano.³ In its Response to the Notice of Objections, the Government attached an affidavit by the investigating Customs Agent averring that the "[t]he information obtained from the two 'industry sources' was provided to the U.S.

² This finding of mootness is not to imply that the court believes the Magistrate Judge had any obligation to hold a hearing. Indeed, the Magistrate Judge did not. See E.D. Pa. R. Civ. P. 7.1(f).

³ Moreover, NRI has not convinced this court that a Landano articulation is even necessary. Landano was a Freedom of Information Act case to uncover information to assist a criminal defendant win reversal of his conviction. The instant case is a civil discovery matter aimed at uncovering information to bolster a charge of defamation.

Customs Service by the sources on the condition that the identity of the sources would not be revealed." No evidence has been presented by NRI to bring the Customs Agent's averments in doubt. Consequently, the Government has met its burden by establishing that the informer provided information with an assurance of confidentiality. See Landano, 508 U.S. at 172.

D. Should the Magistrate Judge have found that under Roviario NRI's interests surpassed those of the Government's?

NRI claims that under Roviario it is clearly entitled to discover the identities of the informants and that the Magistrate Judge erred in deciding otherwise. We disagree.

In Roviario, the Supreme Court stated that to overcome the Government's basic right to withhold an informer's identity, a court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." This is also known as the "informer's privilege."⁴ In Roviario, the Court also stated that "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's

⁴ Under the informer's privilege "the state is normally entitled to refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of law." See Hoffman v. Reali, 973 F.2d 980, 987 (1st Cir. 1992) citing J. Weinstein and M. Berger, Weinstein's Evidence para. 510 at 510-1 (1991); 8 Wigmore, Evidence § 2374(f) at 761 (McNaughton rev. 1961).

testimony, and other relevant factors." Roviaro v. United States, 353 U.S. 53, 62 (1957).

Although initially used in criminal cases, the Roviaro test has also been applied in civil cases. See Lawmaster v. United States, 993 F.2d 773, 774 (10th Cir. 1993); Hoffman v. Reali, 973 F.2d 980, 987 (1st Cir. 1992); Holman v. Cayce, 873 F.2d 944, 946 (6th Cir. 1989). However, the party seeking to overcome the informer's privilege has a greater hurdle in civil cases than criminal " since not all constitutional guarantees which inure to criminal defendants are similarly available to civil defendants." Dole v. Local 1942, IBEW, 870 F.2d 368, 372 (7th Cir. 1989) (citations omitted); see also Lawmaster, 993 F.2d at 775.

Applying the Roviaro test to the instant case, this court finds that NRI has failed to show a need for the information which outweighs the Government's informer's privilege. NRI is not a criminal defendant seeking information to help prepare a defense. Consequently, because NRI's potential claim is civil and not criminal, NRI has a lesser interest in disclosure at the very outset. Moreover, NRI's motivation in seeking disclosure also weighs against its case. NRI is seeking to sue the informers in the hope of winning damages for what NRI claims is business disparagement. This scenario is one of the situations against which the informer's privilege is meant to protect. As the Seventh Circuit noted in Dole, the informer's privilege does not just protect against physical reprisal but also more subtle forms such as "blacklisting, economic duress and social ostracism." 870 F.2d

at 372. The filing and prosecution of a business disparagement suit falls squarely within the category of economic duress described in Dole.

The Government's stated reason for failing to disclose the identity of the informants is that it has a policy of always refusing so that potential sources will feel free to speak to the Government without the threat of any kind of retaliation. Although, it is conceivable that under Roviaro, a future litigant could successfully attack this blanket policy,⁵ this is not the case to do it.

Here, although some of the informant's information proved to be inaccurate, some of the information was accurate. NRI admitted at the hearing that one of its former employees was allegedly engaged in the illegal importation of refrigerant materials using innocent contacts at NRI. While there is no investigative evidence that those contacts were co-conspirators with the former NRI employee, it is obvious that the illegal activity succeeded through NRI, although NRI may well have been an unwitting vehicle for the criminal conduct. An outsider could not reasonably have known that those employees within NRI were not a criminal source of the illegal importation. Therefore, the court finds that the informants' information was sufficiently reliable such that there can be no assignment of competitive vindictiveness to vitiate the

⁵ Cf. Landano, 508 U.S. at 181 (holding that the Government was not entitled to a presumption that a source was confidential within the context of a Freedom of Information Act request every time a source provides information to the FBI).

informer's expectation of non-disclosure of identity.

Furthermore, according to the Government's testimony at the hearing, although there is no ongoing investigation into NRI's importation practices, there is still an ongoing investigation into the illegal importation practices of others. Thus, the Government has a heightened interest in ensuring that the willingness of potential informants to cooperate on such an important environmental pollution issue is not chilled by any retribution suits filed against them by NRI or others.

Therefore, the court finds that NRI's interest in pressing potential civil claims against industry competitors does not override the Government's interest in preserving the anonymity of its informants.

IV. CONCLUSION

For the reasons stated above, the Plaintiff's motion is denied, and the Order of the Magistrate Judge is affirmed.

An appropriate Order follows.

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ORDER

AND NOW THIS day of July, 1996, upon consideration of
National Refrigerants, Inc.'s motion to compel disclosure, it is
hereby ORDERED that the motion is DENIED.

BY THE COURT:

J.

By Fax on _____

to: